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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1946

No. 679

MARKET STREET RAILWAY COMPANY
(corporation),
Petitioner,

vs.

RAILROAD COMMISSION OF THE STATE OF CALIFORNIA, FRANCK R. HAVENNER, C. C. BAKER, JUSTUS F. CRAEMER, RICHARD SACHSE and FRANK W. CLARK, the members of and constituting the Railroad Commission of the State of California,
Respondents.

PETITIONER'S REPLY BRIEF.

CYRIL APPEL,
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WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PETITIONER'S REPLY BRIEF.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

FOREWORD.

Petitioner desires to briefly reply to certain contentions urged in the answer of the City and County of San Francisco, and to clarify certain of the points made in its petition on file herein.

JURISDICTION.

In the brief of the City and County of San Francisco the case of *Fox River Paper Company v. Railroad Commission of Wisconsin*, 274 U. S. 651, is cited as authority for the proposition that this Court lacks jurisdiction to review the decision and judgment of the Supreme Court of the State of California. Upon examination it will be found that the cited case holds just the opposite and is authority for the granting of the writ of certiorari sought by petitioner herein. In that case the plaintiff in error drew in question the validity of a statute of the State of Wisconsin under the due process clause of the 14th Amendment, alleging that the determination of the Railroad Commission acting under the statute operated to deprive plaintiffs of their property without due process of law. The Court below upheld the validity of the act, and the case was brought before this Court on writ of error. This Court said with reference to its jurisdiction:

> "The right set up in the bill is one under the Federal Constitution. *Whether the state court denied that right or failed to give it due recognition is a question upon which the plaintiffs are entitled to invoke the judgment of this court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends*

upon state law. Cf. West Chicago Street R. Co. v. Chicago, 201 U. S. 506, 50 L. Ed. 845, 26 Sup. Ct. Rep. 845; Ward v. Love County, 253 U. S. 17, 22, 64 L. Ed. 751, 758, 40 Sup. Ct. Rep. 419; Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. Rep. 341, 4 Ann Cas. 1175; Appleby v. New York, 271 U. S. 364, 380, 70 L. Ed. 992, 999, 46 Sup. Ct. Rep. 569."

That the California Supreme Court has evaded the claims of petitioner herein that to arbitrarily award the amount of unclaimed excess fares to the City and County of San Francisco, a municipal corporation not shown to have paid any part thereof to petitioner, is to confiscate the property of petitioner in violation of the 14th Amendment, is clear from the opinion of that Court, and from the dissenting opinion of Mr. Justice Edmonds, where it is said:

"In my opinion, the Market Street Railway Company is entitled to retain the accumulated fund representing excess fares paid by its patrons. It is said that, because of the provisions of the stay order, the carrier may not successfully maintain a claim of legal ownership of the money now in its possession. *But by such an order, this court could not confiscate for the public property which the railroad might thereafter lawfully acquire, nor prevent passengers from abandoning to the corporation amounts paid in excess of the reduced rate during the time the order of the railroad commission was held in abeyance.*"

PETITIONER IS THE LEGAL OWNER OF ALL FARES COLLECTED BY IT.

In the opinion of the Court below the Supreme Court of California has arbitrarily endeavored to deprive your petitioner of its property by finding that petitioner was not the legal owner of the excess fares collected by it, giving as its reason the following:

> "In the stay order it was recognized that the Company should be entitled to the additional one cent for each fare collected pending review only if it prevailed and the Commission's order was annulled. That the Company should have no legal ownership in the excess in the event of affirmance was recognized in the stay order, namely in the purpose to prevent loss to the Company if the order should be annulled, and in the further provision for refund and disposition of the excess otherwise than to the Company in the event of affirmance. The Company necessarily accepted the conditions of the order by acceptance of the stay * * *."

We submit that there is nothing in the stay order which has any legal bearing upon whether or not petitioner became the legal owner of each fare of seven cents collected by it during the time the stay order was in effect. The stay order only exacted from petitioner a bond of $100,000 and required the deposit of securities, both to enforce the prompt payment by it of all damages caused by the delay in the enforcement of the order of the Commission and of all moneys which any person might *be compelled to pay petitioner* for transportation, pending review, in excess of the charges fixed by said decision and order of the Commission, and of all moneys payable to the

State of California, in the event said order was affirmed. (R. 115, 116-117.)

On the contrary, the provisions of the stay order emphasize that the passengers of petitioner would be *compelled* to pay the fare demanded by petitioner for transportation, and the inference is inherent therein that the Company would collect and hold such fares as its own property, but would refund to its patrons any amount determined to be excessive if the Commission order were sustained.

The coercive character of the order will be noted from the provision therein inserted by the Court below, over the objection of petitioner's counsel (R. 159), that "the State shall be entitled to all such excess charges or moneys which petitioner has unsuccessfully attempted to refund", and the provision that "Acceptance by petitioner of the benefits of the stay hereby ordered shall be deemed an acceptance of and a consent to the terms and conditions prescribed herein". (R. 118.)

The State Court had previously found that petitioner would lose $3000 per day unless the stay were granted. Under such circumstances petitioner was compelled to accept the stay order as written, but it does not follow, as asserted by the Court below, that the Company accepted the conditions of the order by acceptance of the stay.

This Court heretofore has had something to say about similar conduct of State Courts in connection with such duress and coercion as a ground for claiming consent to the deprivation of property. We refer to the case of *Union Pacific Railroad Company v. Public Service Com-*

mission of Missouri, 248 U. S. 67, from which it appears that the Commission charged the company nearly $11,000 for a certificate authorizing the issuance of an issue of bonds, although the company had only 6/10 of a mile of track in Missouri out of a line over 3500 miles long. The company was compelled to secure the certificate, for otherwise its bonds would have been unmarketable, and it would have been subject to heavy penalties. The company protested against the charge as an unconstitutional interference with interstate commerce and bad under the 14th Amendment. The company applied for certiorari and the Court of first instance upheld the company and held that only a fee of $250 should have been charged. On appeal the Missouri Supreme Court reversed the Court below on the ground that the company was estopped by filing its application.

This Court through Mr. Justice Holmes, after holding the charge to be an unlawful interference with commerce among the States, said:

> "The Supreme Court of the state avoided this question by holding that the application to the Commission was voluntary, and hence that the railroad company was estopped to decline to pay the statutory compensation. It is argued that a decision on this ground excludes the jurisdiction of this court. But the later decisions show that such is not the law, and that, on the contrary, it is the duty of this court to examine for itself whether there is any basis in the admitted facts, or in the evidence when the facts are in dispute, for a finding that the Federal right has been waived. Creswill v. Grand Lodge, K. P., 225 U. S. 246, 56 L. Ed. 1074, 32 Sup. Ct. Rep. 822. *Were it otherwise, as conduct under duress involves*

a choice, it always would be possible for a state to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to accept it, and then to declare the acceptance voluntary, as was attempted in Atchison, T. & S. F. R. Co. v. O'Connor, 223 U. S. 280, 56 L. Ed. 436, 32 Sup. Ct. Rep. 216, Ann. Cas. 1913C, 1050."

"On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress. The certificate was a commercial necessity for the issue of the bonds. The statutes, if applicable, purported to invalidate the bonds and threatened grave penalties if the certificate was not obtained. The railroad company and its officials were not bound to take the risk of these threats being verified. Of course, it was for the interest of the company to get the certificate. It always is for the interest of a party under duress to choose the lesser of two evils. *But the fact that a choice was made according to interest does not exclude duress.* It is the characteristic of duress properly so called." (Emphasis supplied.)

We think it will not be difficult for this Court to discern the application of the principles enunciated in the cited case to the facts presented in the case at bar where petitioner was given the choice of accepting the stay with the illegal and unauthorized conditions with reference to unclaimed excess charges therein contained, and the "confession" that it accepted the conditions if it accepted the stay, which was wrung from petitioner by the Court below so that it might point thereto as proof of voluntary submission, or taking the very real loss of $3000 per day in revenue pending the determination of its petition for

writ of review, with no chance to ever collect the same from its unknown passengers if it succeeded in overturning the commission order.

The City and County on pages 22 to 26 purport to reply to the petition on file herein on the merits, and among other things it is said that

> "We take issue with the assertion that the one cent excess in fare ever became the property of petitioner",

and the contention is urged that when petitioner took possession of the excess fare during the operative period of the stay order, it did so as a mere *custodian*. This is not a ground relied upon by the California Supreme Court as a basis for its decision, but it poses some interesting questions.

If petitioner did not gain title to the disputed extra cent upon its payment to petitioner by each passenger, it must follow that title was retained by the passenger. If so, then upon what basis can the Supreme Court of California justify its decision awarding the sum total of the excess fares to the City and County of San Francisco, and upon what legal basis can the City claim such excess fares?

Does such contention square with the *Bell Telephone Company* case which holds the relationship is that of debtor and creditor?

Counsel for the City and County assert on page 24 of their answer that had the State Supreme Court required your petitioner to deliver, day by day, the monies derived from the excess in fare to be impounded with the Court's own custodian, that your petitioner would not be bold

enough to assert that title was gained by it to the monies so deposited. Petitioner does assert that it would have obtained title to the sum just the same. The mere fact that thereafter the money was impounded by the Court would not alter the legal situation in the slightest degree. This is pointed out in the dissenting opinion of Mr. Justice Edmonds.

Counsel for the City and County, in attempting to answer petitioner's argument that it gained title to the fares collected by it has no answer to the proposition that if the money were stolen or destroyed by fire, the loss would fall upon petitioner and it would still have to refund the money to those who paid the excess fares, *admit that there is no answer to our point when the best they can do is to say that a mere custodian would be liable for negligence occasioning the loss of the fund.* But suppose there was no negligence! Can it be denied that petitioner would still be liable to respond to the cause of action of those who paid the excess fare? This must be so only because petitioner was the legal owner of all fares collected by it.

The final futile argument advanced by the City Attorney is that "it is by no means inconceivable that an absolute liability might be imposed upon petitioner as a custodian", and that "a custodian of money may enter into an obligation which binds him absolutely to pay and the obligation entered into by the petitioner appears to be of that nature". *Significantly, counsel fail to point to any obligation of such nature entered into by petitioner herein.*

THE BELL TELEPHONE CASE CANNOT BE DISTINGUISHED.

City and County of San Francisco, without success, has attempted to distinguish the case of *Illinois Bell Telephone Co. v. Slattery,* 102 Fed. (2d) 58, cited as authority for the proposition that petitioner herein was the legal owner of the fares collected by it during the time the order of the California Railroad Commission reducing petitioner's rate of fare from seven cents to six cents was held in abeyance by the stay order granted by the California Supreme Court, and that the relationship existing between petitioner and its passengers who had paid fares in excess of the rate fixed by said Commissioner was that of debtor and creditor. In both the cited cases and the case at bar provision was made in decrees of the respective Court that after the expiration of a certain time all further claims should be barred. The mere fact that in the *Bell Telephone* case it was provided in the decree that the utility was released from any claims which might be presented by the subscribers after the expiration of the limitation fixed does not affect the legal situation in any degree, because it was held by the Court that the subscribers, at the expiration of the limitation period, were not only without remedy to assert a claim, but the *debt owing by the plaintiff* was extinguished. No release was needed.

The essential part of that decision, which holds that the subscribers were not the owners of the fund or any part thereof, that they only had a claim for refund, and that the relation of debtor and creditor existed as between the utility and its subscribers, remains unchallenged.

It is also interesting to note that the industry of counsel for the City and County has produced no case which holds contrary to our position that petitioner became the owner of the money collected by it as fares from its passengers.

Further research on our part has brought to light a decision of this Court which sustains the legal proposition advanced in the petition herein that the company became the owners of the fares collected by it (including the amount later determined to be excessive) and that a cause of action arose in favor of the passenger to recover the excess charge. We refer to *A. J. Phillips Co. v. Grand Trunk Western Railway Company,* 236 U. S. 662, wherein this Court held:

> "When the overcharge was collected a *cause of action* at once arose, and the shipper at once had the right to file a complaint, or to intervene in proceedings instituted by others."

THE FINDING OF THE COURT BELOW THAT PETITIONER IS NOT THE OWNER OF THE FARES COLLECTED BY IT WHILE THE STAY ORDER WAS IN EFFECT IS NOT CONCLUSIVE UPON THIS COURT BECAUSE SUCH FINDING IS NOT SUPPORTED BY ANY SUBSTANTIAL EVIDENCE.

Counsel for City and County of San Francisco have contended in their brief (p. 15 and following) that this Court does not have jurisdiction to hear this cause because the Court below found that petitioner was not the legal owner of all fares collected by it while the stay order was in effect, and such determination is conclusive upon this Court.

We, however, contend that such finding or decision of the Court below is not based upon or supported by any substantial evidence, and that, such determination, in view of petitioner's claim of federal right, requires an examination of the record to ascertain if such ground of decision is broad enough or adequate to sustain the decision.

In the brief of City and County of San Francisco it is said (p. 16) that the theme of the present petition for writ of certiorari is that the Court below erred as to the determination of absence of property interest and that therefore the petitioner has been deprived of property without due process of law, and that:

> "There is, of course, no claim of a lack of procedural due process."

In making the statement quoted above counsel for City and County are in error. Petitioner contended in its petition that the ruling of the Court as to the property interest of petitioner in the excess fares is arbitrary and such ruling is unsupported by the evidence. A decision not based upon substantial evidence is invalid for lack of due process.

In the petition herein (p. 17) petitioner has urged that the California Supreme Court erred:

1. In holding that petitioner was not the legal owner of all moneys collected by it for the transportation of passengers during the time the operation of the order of the California Railroad Commission was suspended by the order of said Court.

2. In holding that petitioner had no legal ownership in the unclaimed excess charges by reason of a condition inserted in the stay order by the Court over the objections of petitioner, which was not required or authorized by Sections 67 and 68 of the California Public Utilities Act, and in holding that petitioner necessarily accepted the conditions of the order by acceptance of the stay.

The record is devoid of any evidence to sustain the two findings set forth in the specification of errors above quoted.

Where the existence of the alleged federal question itself depends upon a finding of fact, the Supreme Court will examine the facts to see whether the evidence adequately sustains the finding.

King v. Putnam Investment Co., 248 U. S. 23, 39 S. Ct. 15, 63 L. Ed. 102;

Truax v. Corrigan, 257 U. S. 312, 324, 42 S. Ct. 124, 66 L. Ed. 254, 27 A.L.R. 375.

In *Fiske v. Kansas*, 274 U. S. 380, it was held that a state syndicalism act was applied to sustain the conviction of defendant without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts, and that as thus applied the act was an arbitrary and unreasonable exercise of the police power of the state, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the 14th Amendment. It was there said (p. 385):

"And this court will review the finding of facts by a State Court where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." (Cases cited.)

In *Truax v. Corrigan,* 257 U. S. 312, this Court said:

"In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. *If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here.*"

If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

Davis v. Wechsler, 263 U. S. 22.

The Supreme Court of the State of California has avoided deciding the oft asserted claim of petitioner herein that to take the unclaimed excess charges from it and to award the same to the City and County of San Francisco, or to the State of California, would be

to deprive it of its property without due process of law in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, by the mere statements that "Legal ownership is not a factor appearing in the present case" and "In the stay order it was recognized that the company should be entitled to the additional one cent for each fare collected pending review only if it prevailed and the Commission's order was annulled".

City and County of San Francisco now contends that since the Court below has found that petitioner was not the owner of the additional one cent collected by it as part of its fare of seven cents, that therefore petitioner could not be deprived of its property without due process of law because it had no property.

Whether the determination of the question of ownership be regarded as a finding of fact or a conclusion of law, in either event, if such finding of fact be not supported by the evidence in the record or such conclusion of law be predicated upon facts supported by evidence petitioner has not been afforded due process.

This Court has fequently held that it will review the findings of facts by a State Court where the Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U. S. 655, 668.

In *Stanley v. Schwalby,* 162 U. S. 255, 274, 277-279, which was an action of ejectment, the validity of an authority exercised under the United States was drawn in question, and depended upon whether the United States had a good title to the land in controversy. That question turned upon whether the attorney for the United States, who represented it in the acquisition of the land, knew at the time of a prior deed to one McMillan, and the State Court found he had such knowledge. In the Supreme Court of the United States on writ of error to review the decision of the Court below it was insisted, on the one hand, that the finding was conclusive, and, on the other, that the evidence was insufficient, as matter of law, to warrant the finding, and could be examined to determine whether this was so. In that connection this Court, although recognizing the general rule that findings upon pure questions of fact are not open to review, said:

> "But so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involve the decision of a question of law, it must be reviewed by this Court, *whether that question depends upon the Constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence.*"

Upon examining the evidence in the cited case, this Court held it to be "wholly insufficient, in fact and in law, to support the conclusion that the attorney had any notice of the previous deed to McMillan", and accordingly reversed the judgment of the State Court.

The rule enunciated above has found expression by this Court in many types of cases. For example, in *Schlemmer v. Buffalo, P. & R. Co.*, 205 U. S. 1, the case arose under the Federal safety appliance law, and the State Court found that the deceased contributed to his injury by his own negligence, thereby preventing a recovery. This Court exercised the power to examine the evidence, notwithstanding a contention that the finding was conclusive, and reversed the judgment upon the ground that it appeared that what had been found to be contributory negligence was at most an assumption of the risk, which was not a defense under the Federal statute.

Perhaps the most frequent exercise of this power occurs in cases arising under the clause of the Constitution forbidding a State to pass any law impairing the obligation of a contract, the existence of the contract in such cases being a mixed question of law and fact. In *Louisville Gas Co. v. Citizens' Gaslight Co.*, 115 U. S. 683, 697, a leading case upon this subject, it was said:

> "Whether an alleged contract arises from state legislation, or by agreement, with the agents of a state, by its authority, or by stipulations between individuals exclusively, we are obliged, upon our own judgment, and independently of the adjudication of the state court, to decide whether there exists a contract within the protection of the Constitution of the United States."

It is respectfully submitted that when due regard is had for the rule before indicated, and so often applied in so many different types of cases, it does not admit of doubt that in the case at bar this Court should examine

the entire record, which includes the only evidence which was received by the Court below, to determine whether the general finding that petitioner was not the legal owner of the fares collected by it during the pendency of the review proceedings necessarily involved the decision of questions of law bearing upon the right under the Constitution of the United States set up by petitioner herein.

In conclusion, it is further submitted that upon an examination of the record herein it will be clear that there is no evidence to sustain the finding of the Court below that petitioner was not the legal owner of the excess fares remaining in its hands after it had made refunds to all who applied for the same within the time allowed by the California Supreme Court for such action, and that in construing and applying the California Public Utilities Act in the manner set forth in its opinion, the Supreme Court of California deprived your petitioner of its property without due process of law contrary to the provisions of Section 1 of the 14th Amendment to the Constitution of the United States.

Dated, San Francisco, California,
December 4, 1946.

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